Canada Appeals Office on Occupational Health and Safety
Bureau d'appel canadien en santé et sécurité au travail

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Canada Labour Code
Part II
Occupational Health and Safety

Duane Mattatall
applicant

and

Algoma Central Corporation
employer

Decision No. 04-004
February 23th, 2004

This case was decided by appeals officer Pierre Rousseau

Health and Safety Officer, Marine Safety

Captain Peter Mihalus, Transport Canada, Safety and Security, Ottawa, Ontario Canada

[1] This case concerns an appeal submitted on February 12th, 2003, by, Duane Mattatall, an employee of Algoma Central Corporation, who want to appeal five charges levied by safety officer Captain Peter Mihalus against his employer because:

> *"They don't reflect serious injury of employees like myself and I want to appeal Captain Peter Mihalus decision regarding my testimony and documents requested several times over the years with Mr Robert Gowie also a safety officer from Marine Safety"(sic).*

[2] The appeal seemed to relate to a decision to prosecute Algoma Central Corporation, by safety officer Captain Peter Mihalus.

[3] The facts were that health and safety officers Captain Peter Mihalus and Mr. Bob Gowie had investigated on February 1998, an accidental release of mercury in the ballast control room of the M. V. "ALGOWEST" which occurred on November 20th, 1996. The conclusion of the Environmental testing report conducted in the control room of the vessel concluded that:

> "The contamination level is high and that it is highly dangerous to work in this room with out any protection …
>
> Algoma Central Marine must decontaminate the Engine Control Room until he is 95% sure that the level of mercury in the air is under the TLV-TWA over an 8 hr period.
>
> If a worker has to perform some work in an atmosphere lower than 0.5 mg/m^3, OSHA/NIOSH recommend to wear a chemical cartridge respirator specific to mercury vapour (CCRS) until the concentration level is under the TLV-TWA (11).

> Algoma Central Marine must supply CCRS respirator to all people having to work in the Engine Control Room until Algoma is 95% sure that the worker exposure level is under the TLV-TWA."

[4] Following the investigation, five charges were levied by safety officer Mihalus against Algoma Central Corporation on the 20th of October 2001, at the City of Port Colborne, Ontario, Canada.

[5] Despite what Mr. Mattatall may think, the decision of prosecuting Algoma Central Corporation, does not constitute a decision who can be appealed under subsection 129(7) or section 146 of the *Canada Labour Code,* Part II. As specified in section 128 of the *Code*, a decision of no danger, which would give Mr. Mattatall the right to appeal it, can only exist after an employee has refused to work and, as stipulated in subsection 129(4) of the *Code*, a health and safety officer has made a decision concerning the absence of danger. As indicated in subsection 129(7) of the *Code*, this is the only type of decision that can be appealed. These provisions read as follows:

> 128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
>
> (*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
>
> (*b*) a condition exists in the place that constitutes a danger to the employee; or
>
> (*c*) the performance of the activity constitutes a danger to the employee or to another employee.
>
> 129. (1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is an employee member of the work place committee; the health and safety representative; or if a person mentioned in paragraph (*a*) or (*b*) is not available, another employee from the work place who is designated by the employee
>
> (4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.
>
> (7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

[6] As there was no case of a refusal to work in this case. As a result, this situation does not apply to Mr. Mattatall. The only other situation where an appeals officer can intervene is when a direction has been issued.

[7] In short, an appeals officer only has the legal authority to intervene in a situation when, as stipulated in section 146.1 of the *Canada Labour Code*, the law authorizes him or her to do so: 146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may...

[8] As the appeal of Mr. Mattatall concern the charges levied against his employer by safety officer Mihalus and not the directions issued by safety officer Robert Gowie to Algoma Central Corporation, the 18th of May 2001.

[9] I conclude in this particular case that I have no legal authority to hear this case. I therefore dismiss Mr. Mattatall's request. This file is now closed.

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Pierre Rousseau
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 04-004

Applicant: Duane Mattatall

Employer: Algoma Central Corporation

Key Words: Decision of no danger, direction, prosecution, the legal authority of an appeals officer.

Provisions:

***Code*:** 128(1), 129(1), 129(4), 129(7), 146.1

Summary:

A health and safety officer investigated a dangerous situation aboard a ship and decided to prosecute the employer. The employee filed an appeal claiming that the charges levied against his employer did not reflect his condition and his testimony. The employee thought he could appeal the decision to prosecute of a health and safety officer. The appeals officer concluded that he did not have the legal authority to hear the appeal and therefore dismissed it.